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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 703(e)
of the Telecommunications Act
of 1996)

Amendment of the Commission's Rules
and Policies Governing Pole
Attachments)

CS Docket No. 97-151

COMMENTS OF GTE SERVICE CORPORATION

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To: The Commission

COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation ("GTE"), on behalf of its affiliated telecommunications companies,¹ hereby submits its comments in response to the Notice of Proposed Rulemaking issued in the above-referenced docket.² GTE believes that this rulemaking should proceed with the objective of promoting a deregulatory system that encourages private negotiation over government-refereed dispute resolution. To that end, the Commission should seek to develop a clear and easy-to-implement rate formula that allows the parties to negotiate with a common understanding of its requirements.

¹ GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc., and GTE Communications Corporation.

² Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151(Aug. 12, 1997) ("NPRM").

GTE's comments in this proceeding and those filed in the companion CS Docket 97-98 are intended to facilitate realization of this goal.³

INTRODUCTION AND SUMMARY

GTE generally supports the Commission's efforts to implement Congressional intent to create a more fair and equitable recovery mechanism for pole costs. Indeed, the new formula for non-cable attachments provides for more equitable recovery of pole costs from all providers. Nonetheless, the 1996 Act expresses a strong preference for private negotiations to resolve pole attachment disputes. A series of small modifications in the Commission's rules will greatly facilitate these private negotiations. Only if private negotiations fail should the formula be utilized and government intervention be required.

The Act established two pole attachment rates: one for cable-only attachments and a second rate established in accordance with the 1996 Act for all other attachers. For purposes of calculating the number of "attaching entities" for attribution of the costs of unusable space, the Commission should include third-party overlashers, but exclude third parties that obtain dark fiber in existing attachments or overlashed facilities. The Commission's current presumptions regarding pole height also should be maintained, and there is no basis for modifying the formula based on weight or wind load. Moreover, the safety space should be considered unusable space and its costs borne by all parties.

In calculating the cost distribution for unusable space, the Commission should "count" all attaching entities, regardless of the number of attachments they use or the

³ The Commission has already indicated that the comments filed in the *Notice of Proposed Rulemaking, Amendment of Rules and Policies Governing Pole Attachments*, 12 FCC Rcd 7449 (1997) (the "Pole Attachment Notice") will be incorporated by reference into this proceeding. NPRM ¶ 8. Nonetheless, for clarity GTE has reiterated certain positions taken in those comments here.

space they occupy. The pole owner, however, should be excluded from this calculation, because the owner already bears one-third of the costs of the unusable space under the statutory scheme. As explained herein, the presumptive number of attaching entities for calculating this rate should be three. In calculating the usable space charge, GTE continues to support a transition to the gross book method to better account for these costs.

Finally, there are three additional issue areas the Commission must address. In setting conduit rates, the Commission should adopt the half-duct presumption for the space occupied by each attacher and assume that there are four ducts per conduit system, one duct of which is unusable (as a maintenance duct, one used by government, or otherwise not available). Second, right-of-way rates should be set by contract, and the Commission should address complaints on a case-by-case basis. Third, the Commission should phase in any rate increases over five years with the first increase becoming effective on February 8, 2001.

I. The Commission Should Implement Changes in the Regulatory Structure To Encourage Private Negotiation.

In this rulemaking, the Commission is charged with responsibility for implementing the Congressional extension of pole attachment rate regulation to the telecommunications arena. Section 224(e) of the Act sets out the statutory framework for establishing telecommunications attachment rates, but it is to be employed only in cases where "the parties fail to resolve such a dispute over such charges." Indeed, the Conference Committee explained that:

The conference agreement amends section 224 of the Communications Act by adding new subsection (e)(1) to *allow parties to negotiate* the rates, terms and conditions for attaching to poles, ducts, conduits and rights-of-way owned or controlled by utilities.⁴

⁴ H.R. Conf. Rep. No. 104-458 at 207 (1996) (emphasis added).

This Congressional preference for privately negotiated agreements is also consistent with the overall purposes of the revised Act "to provide for a pro-competitive, de-regulatory national policy framework."⁵

In furtherance of this directive, GTE agrees that the Commission should require the parties to include "a brief summary of all steps taken to resolve its dispute"⁶ in all complaint filings, whether in the telecommunications or the cable context. However, further support for the negotiation process would be provided by requiring submission of additional information. For example, under the current rules, a utility is required to disclose the basis for its pole attachment rate calculation. 47 C.F.R. § 1.1404(h). It would obviously promote settlement if, prior to filing a complaint, the attaching party were required to make a corresponding disclosure regarding its own rate calculation and, specifically, the basis for its disagreement regarding the formula results. This disclosure should be made in a Notice of Intent to File a Complaint filed at least 30 days prior to the initiation of an FCC complaint proceeding. This would force the parties to narrow the issues, focus and thus expedite negotiations, and ultimately avoid complaints.

There are other important steps that should be taken to encourage good faith negotiations. As explained in GTE's prior comments and noted above, the best method for encouraging commercial transactions undeniably is to create a clear and readily available pole attachment rate formula that informs private negotiations and eliminates any perceived advantage a party may have in seeking Commission intervention in

⁵ H.R. Conf. Rep. No. 104-458 at 113 (1996); *see also Montana Cable Television Ass'n v. PacifiCorp*, 10 FCC Rcd 11478 (1995) (negotiated settlement serves the public interest); 47 C.F.R. §§ 1.1411, 1.1404(i). The *First Interconnection Order* echoed these sentiments: the Commission's proposed rules were "designed to give parties flexibility to reach agreements on access to utility-controlled poles, ducts, conduits, and rights-of-way, without the need for regulatory intervention." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16059 (1996) ("*First Interconnection Order*").

⁶ NPRM at ¶ 12.

attachment disputes. GTE further endorses a "statute of limitations" of one year for pole attachment rate complaints and the creation of an "amount in controversy" requirement of \$5000 a year prior to permitting such cases to go forward.⁷ Such requirements would prevent parties from filing frivolously small complaints that consume excessive Commission and private party resources. Moreover, by giving parties one year to file a complaint after new rates go into effect, the system creates "safe harbors" for business planning and lends predictability to the process. These proposed reforms, in concert with a continued Commission preference for private negotiations, will expedite the pole attachment process and facilitate rapid deployment of all facilities.

II. Attachment Space Use

Heritage and Application of the Formulas

The Commission has now been given authority over two discrete types of attaching parties: cable television systems and telecommunications carriers.⁸ Under the old cable-only regime, the Commission in *Heritage* determined that a cable television operator providing non-video services was still entitled to a regulated rate by virtue of its status as a "cable television system."⁹ The NPRM seeks comments on extension of the *Heritage* holding to other circumstances where efforts are made to limit use of attachment space.¹⁰

⁷ See SBC Comments in the CS Docket No. 97-98 at 41.

⁸ See, e.g. 47 U.S.C. § 224(f)(1).

⁹ *Heritage Cablevision Associates of Dallas, L.P., et al. v. Texas Utils. Elec. Co.*, 6 FCC Rcd 7099 (1991), *recon. dismissed*, 7 FCC Rcd 4192, *aff'd sub nom.*, *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

¹⁰ NPRM ¶ 13.

Initially, it is important to recognize that the Act applies to those attaching parties who are "telecommunications carriers" or "cable television systems" regardless of the types of services provided over these facilities. Within this jurisdiction, however, Congress has developed two different formulas: (1) the old Section 224 formula which applies only to "pole attachments used by a cable television system solely to provide cable service." 47 U.S.C. § 224(d)(3) (emphasis added), (2) and the new formula which applies to all other cable television systems and telecommunications carriers. Under this construction, once a cable system offers any non-cable services, the new Section 224 formula will apply. Therefore, if the *Heritage* case were to arise today, the new formula's rate would apply.¹¹

The Scope of Attachment Rate Regulation

The broad reach of the Commission's authority in this regard reinforces the conclusion that the goals of non-discrimination and competition support the application of the pole attachment formula to ILECs as well. The goal of the pole attachment formula has been, and continues to be, to prevent those with market power arising out of the ownership of pole infrastructure from using that power to hinder competition. With the 1996 Act, Congress extended this rationale into telecommunications. American consumers would be well served by eliminating discriminatory treatment and assisting competition by extension of the rate formula to ILECs. Although the Commission has determined that utilities are not mandated to provide access to ILECs,¹² when such access is provided, GTE believes it is appropriate that the pole attachment rate formula serve as a backstop to private negotiations with the non-ILEC

¹¹ To the extent that information service providers, or other non-qualifying parties, seek to provide unregulated services such as alarm services, the rates for those attachments are beyond the scope of the Act because those providers are neither "cable television systems" nor "telecommunications carriers."

¹² See *First Interconnection Order*, 11 FCC Rcd at 16103-16104.

utility. The Commission should not permit other utilities to extort disproportionate rates from ILECs under the auspices of the 1996 Act.

Overlapping

The Commission also seeks comment on the issues raised by overlapping onto existing attachments.¹³ Overlapping should be permitted only to the extent it can be done safely and responsibly. Therefore, overlapping should proceed only (1) with the pole owner's informed consent, (2) when the overlapping party has an existing, or executes a new, pole attachment agreement with the pole owner, and (3) if the overlapping complies with all safety standards. These requirements will assure that a pole owner is aware of the facilities on its poles, the relative stress on the pole caused by the attachments, and all of the parties to contact in case of service issues. Absent such requirements, poles would become a regulatory free-for-all with no opportunity for the pole owner even to be aware of the activity on its poles. As property owners, utilities are responsible for the public safety of their poles and are at least entitled to these minimal disclosure requirements by attachers in order to faithfully fulfill these responsibilities.

Overlappers should also be considered "attaching entities" and, therefore, subject to appropriate charges.¹⁴ Under this policy, parties would be permitted to overlap onto their own facilities at no additional charge (as "attaching entities" they already contribute to the cost of unusable space under Section 224(e)(2)). However, third parties seeking to overlap would be counted as "attaching entities" under Section 224(e)(2) and, therefore, required to pay their fair share of the costs of the unusable space. This is consistent with the congressional intent to distribute these costs based on the number of attaching entities. Third party overlappers clearly benefit from the

¹³ NPRM ¶ 15.

¹⁴ 47 U.S.C. § 224(e)(2).

unusable space, but have had the good fortune to find an opportunity to overlash, rather than being required to use their own attachment. However, the benefit to the overlasher party is the same as that enjoyed by any attacher. As such, each should pay an equal share of the costs of the unusable space.¹⁵

Dark Fiber

Use of existing dark fiber inventory contained in current attachments does not raise the same types of issues as overlasher.¹⁶ Because the activation of dark fiber in existing attachments causes no additional stress on the pole or administrative expense to the utility, there is no basis for allocating costs to the third party users of dark fiber. The costs of the existing attachment or overlasher itself will have already been paid by the facility's owner to the utility.¹⁷ Thus, utilities should address all concerns regarding the attachment itself to the attachment's owner who will be responsible for fees, notification, and safety issues.¹⁸ Any system that would require utilities to monitor use of dark fiber would be inordinately burdensome and difficult to implement. Tracking third party transactions which permit carriers to utilize dark fiber in existing attachments should be beyond the scope of the pole attachment regulatory regime.

¹⁵ There is no basis to distinguish between overlashers onto cable providers and overlashers onto telecommunications carriers. Indeed, GTE sees no rationale for the differing rate treatment afforded to cable services generally, which for all intents and purposes are physically identical to telecommunications attachments. In light of the growth and power of the cable industry, it seems particularly inappropriate that cable providers should receive a subsidized rate, rather than the fairer rate established by the 1996 Act.

¹⁶ GTE's comments on this issue should not be construed to affect or in any way prejudice GTE's position on the availability of dark fiber generally as set out in other proceedings.

¹⁷ However, utilities will need to be informed about the types of services being offered over a cable system's dark fiber in order to determine whether the cable rate applies rather than the new formula. See 47 U.S.C. § 224(d)(3).

¹⁸ GTE believes this dark fiber analysis applies with equal force in the conduit context.

III. Charges for Attaching

A. Presumptions

As set out in GTE's previous comments, there is no evidentiary or policy basis for the Whitepaper's proposals to change the Commission's presumption regarding average pole height and to remove 30 foot poles from the rate calculations.¹⁹ Individual companies are free to rebut the pole height presumptions contained in the formula, but no valid evidentiary support for an industry-wide shift in average pole height has been submitted. The elimination of 30 foot poles is similarly unsupported. Moreover, elimination of these poles has the added disadvantage of imposing a new administrative burden on utilities who would be forced to cull out these poles from their databases.²⁰ The Commission should, therefore, continue to apply its current pole height presumptions in the telecommunications context.

Equally unavailing is the proposal of Duquesne Light Company to include factors such as weight and wind loads in the Commission's rate calculations.²¹ Such factors are without basis in the statute or FCC precedent. The administrative burden and complexity imposed by such a system would be immense without any corresponding gain in accuracy. In addition, such a shift would further obscure the rate calculation from public view, thus undermining the goal of a clear formula that facilitates negotiation.

GTE believes that the 40-inch safety space should be treated the same as other non-usable space on a given pole: the cost should be shared by all parties with pole attachments consistent with the requirements of the Telecommunications Act.²² There

¹⁹ NPRM ¶ 17; GTE Comments at 11-14.

²⁰ At this time, GTE does not even have this data available.

²¹ NPRM ¶¶ 18, 19.

²² 47 U.S.C. § 224(e)(2); NPRM ¶ 20.

are important safety issues surrounding electrical pole attachments; the 40-inch safety space mandated by the National Electric Safety Code (NESC) is designed to benefit all attaching parties by protecting their workers from the risks of contacting electrical attachments. The mandatory nature of the safety space means that for all practical purposes this space is indeed unusable. Because this safety obligation benefits all parties and the general public by providing safe and reliable service, these costs are most appropriately borne by all parties.

It follows that the Commission's proposal to attribute this mandated safety space to the utility should be rejected.²³ While GTE believes this safety space is best categorized as unused, it is particularly unfounded to attribute the safety space to telecommunications utilities. Telecommunications utilities do not require NESC space on poles unless an electric power provider seeks an attachment. To attribute the costs of this space to the telecommunications utility that owns the pole solely on the basis of whether there is a power company attacher is arbitrary and lacks foundation in law or common sense. Indeed, such a policy would create a perverse incentive for telecommunications utilities to decline electrical attachments because doing so may force the telecommunications utility to absorb the costs of the safety space.

B. Allocation of Costs for Unusable Space.

GTE generally supports the Commission's proposed translation of congressional intent into the new unusable space fee formula. There are a number of issues, however, that need to be clarified in applying the formula to specific cases.

Congress made clear that the costs of unusable space are to be "equally" apportioned "among all attaching entities." 47 U.S.C. §224(e)(2). In contrast, in determining the usable space charge, Congress determined that the rate should be based on "the percentage of usable space required for each entity." 47 U.S.C.

²³

NPRM ¶ 20.

§ 224(e)(3). Therefore, in order to implement congressional intent, the Commission must divide the costs of the unusable space equally among the “attaching entities” without regard to the “usable space” occupied by each attacher. Any calculation that includes a usable space factor would be contrary to the congressional requirement of equal apportionment.

In calculating unusable space, the Commission must initially determine the number of “attaching entities” on each pole. Consistent with the Act, the pole owner should be excluded from this count of “attaching entities.” The statutory formula clearly allots one-third of the costs of unusable space to the pole owner; any additional allocation associated with being an “attaching entity” would amount to double-charging, be overly burdensome, and inconsistent with congressional intent.²⁴

Moreover, because the reference to “attaching entities” in Section 224(e)(2) does not otherwise limit application of the term in any way, all parties with attachments or overlashings, including electric utilities, should be counted in this calculation.²⁵ All of these parties benefit from the unusable space and should pay a corresponding fee. There is no basis in the statutory language for the NPRM’s suggestion of singling out ILEC utilities, as opposed to all Section 224 utilities, for inclusion in this calculation.²⁶

²⁴ With respect to the treatment of governmental entities seeking attachments, GTE submits they are few in number. See NPRM ¶ 24. Since these attachers do not pay fees and all parties benefit from the rights of way granted by the governmental entity, GTE believes it is best to ignore these attachers for purposes of calculating the number of attaching entities.

²⁵ However, if the Commission continues to prohibit ILECs who attach on electric utilities’ poles from benefiting from the rate formula, ILECs should not be subjected to charges under this provision. Rates for ILEC attachments are already extremely high; potentially carving out an additional charge for these carriers would be discriminatory and hamper competition.

²⁶ NPRM ¶ 23; Similarly, GTE believes that all parties should be included in calculating the number of attaching entities in conduit as well.

In connection with this policy, GTE strongly supports the use of a presumptive average number of attachments for purposes of calculating the unusable space rate.²⁷ Based on GTE's experience, the appropriate presumption is three. This figure is based on the assumption that now, or in the near future, there will be an average of four parties per pole: ILEC, CLEC, CATV and Electric. Presumably, one of these parties will be the pole owner, thus reducing the overall presumption to three. Although no presumption will be perfect, GTE believes this presumption most closely resembles market conditions going forward. In the interim, the presumption of three attachers will actually result in a lower than appropriate rate because the charges will be divided amongst more parties than are actually attached to most poles. However, this initial under-recovery will "even out" over time as providers fully deploy.

It is important to emphasize that this is only a presumption, which may be rebutted upon an adequate showing.²⁸ Use of a presumption is vastly superior to any type of company-specific pole survey. Such a survey would be extremely costly, need to be frequently updated, and yield only marginal accuracy gains. In fact, GTE does not maintain this information in its computer database at this time and would be heavily burdened by any effort to develop such data.

Similarly, GTE believes that the Commission's efforts to conduct an industry-wide survey would be largely wasteful with little hope of developing a precise figure. In contrast, the parties to this proceeding can provide a wealth of information about the number of attaching parties which GTE believes will support its proposed presumption. The Commission should take the opportunity to resolve this issue decisively in this proceeding by adopting a presumptive average of three attachers per pole.

²⁷ NPRM ¶¶ 26-28.

²⁸ The rebutting party would carry the burden of proof on these issues.

C. Allocation of Usable Space

The Commission proposes to adapt its current cable pole attachment rate formula to apply to the usable space portion of the telecommunications rate calculation.²⁹ GTE, in accordance with its comments in the previous docket, supports the general formula, but urges the Commission to adopt a gross book method for valuing the underlying costs.³⁰ This method has a number of advantages over both the modified net cost proposal and the current cable formula.

First, the gross book cost method would wholly eliminate any problems associated with factoring in a negative net pole investment by removing the depreciation reserve from the rate calculation. Second, the gross book method circumvents the difficult logistical issues associated with calculating the net salvage amount as required by the Commission's modified net cost proposal.³¹ Third, neither the Federal Energy Regulatory Commission ("FERC") nor the FCC require the net salvage amount (necessary for the modified net calculations) to be provided in their accounting reports. Fourth, the gross book method would lend consistency and clarity to pole attachment rates. Finally, the gross book method also most accurately provides for full recovery of the costs incurred in providing attachments.³² For all of these reasons, the Commission should adopt the gross book methodology in this proceeding as well.

²⁹ NPRM ¶ 33; GTE also supports the continued use of the one foot presumption regarding usable space for attaching entities.

³⁰ GTE Comments at 4-9.

³¹ As the Commission cautioned, "the extraction of the net salvage effect from accumulated depreciation could prove to be difficult." *Pole Attachment Notice*, 12 FCC Rcd at 7462.

³² GTE also supports adoption of the gross book method for purposes of calculating an attachment rate in conduit.

IV. Other Pole Attachment Issues

Conduit. The Commission sought comment on the use of various presumptions in setting the conduit rate formula.³³ As set out in our previous comments, GTE supports a half-duct presumption for space occupied by a given attacher.³⁴ Based on its experience, GTE also believes that the average conduit consists of four ducts. Variations in duct diameter are not significant enough to warrant separate consideration of this factor in the formula. Considering diameter would also unduly complicate the formula with even more non-public data, resulting in additional pole attachment disputes.

In calculating unusable space in conduit, GTE believes the Commission should presume that one duct is unusable (as a maintenance duct, one used by government or otherwise not available). For example, municipalities are frequent users of duct capacity. As with poles, GTE believes that all parties benefit from the government franchises that permit conduit use and, therefore, all parties should be responsible for these costs. With these presumptions, GTE believes the Commission's overall conduit formula provides a solid foundation for calculating a fair conduit attachment rate.

Rights-of-Way. GTE, like the Commission, has had little experience in dealing with right-of-way issues.³⁵ As with poles and conduits, the Commission should encourage private negotiations and contracts. If private negotiations fail, GTE believes that case-by-case adjudication is best suited to resolving these disputes. The circumstances and uses surrounding each right-of-way request tend to be unique, thus making a generally applicable formula inapposite. Instead, the Commission should

³³ NPRM ¶¶ 36-41.

³⁴ GTE Comments at 15-17.

³⁵ NPRM ¶¶ 42-43.

monitor events in this area and develop a formula only if the need arises and enough of a pattern emerges to support generalized rules.

Implementation of Rate Increase. Congress clearly provided for a five-year phase-in period for any rate increase, using equal annual increments.³⁶ The Act provides that the phase-in period "begin[] on the effective date of such regulations." The effective date of the regulations is five years after enactment or February 8, 2001. Therefore, the first of the five incremental increases should become effective on that date.

CONCLUSION

With the foregoing modifications, the Commission's proposals for pole attachment rate regulation should be adopted.

Respectfully submitted,

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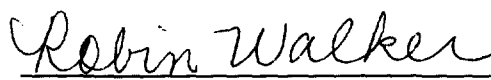
47 U.S.C. § 224(e)(4).

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 1997, I caused copies of the foregoing COMMENTS OF GTE SERVICE CORPORATION to be served via hand delivery to:

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